IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 11, 2006 Session

PAUL L. REED v. CSX TRANSPORTATION, INC.

Appeal from the Circuit Court for Davidson County
No. 02C-1104 Barbara N. Haynes, Judge

No. M2004-02172-COA-R3-CV - Filed on September 26, 2006

A railroad employee appeals the trial court's grant of summary judgment to his employer in this Federal Employer's Liability Act case. Because the employer was not negligent, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Nina H. Parsley, Nashville, Tennessee, for the appellant, Paul L. Reed.

Christopher W. Cardwell and Mary Taylor Gallagher, Nashville, Tennessee, for the appellee, CSX Transportation, Inc.

OPINION

Mr. Reed, an employee of CSX Transportation, Inc. ("CSX"), a common carrier operating railroads, brought this action for injuries he sustained while working as a carman in the Radnor Yard. The lawsuit was brought under the Federal Employer's Liability Act ("FELA"), and Mr. Reed alleged he had been injured in the course and scope of his employment and that CSX was negligent by, *inter alia*, failing to provide a reasonably safe work environment.

CSX filed a motion for summary judgment, and, after a hearing, the trial court granted summary judgment to CSX. The trial court's order stated there were no genuine issues of material fact and that CSX was entitled to judgment as a matter of law "because the Plaintiff was comparatively at fault for not wearing earplugs, and that CSX was not negligent in failing to provide definitive safety guidelines or policies relating to the use of hearing protection outside of specific noted dangerous activities." Mr. Reed appealed.

I. FACTS

On the day of the injury, Mr. Reed was operating a tractor-like machine, or "tugger" for transportation to inspect and repair railcars. While he was driving his tugger, he ran over some banding material,[1] and the material became entangled with, or wrapped around, the axle on the tugger. Mr. Reed first unsuccessfully attempted to remove the banding material by hand. He then decided to use a torch to remove it or "cut it off."

He drove the tugger to the wagon where his torch and safety equipment were stored. He put on some of his safety equipment, but not his earplugs. In preparing to use the torch to remove the banding material from the axle, Mr. Reed positioned himself in such a way that his head was parallel to the ground about a foot to a foot and a half off the ground, with his left ear pointed toward the ground and his right ear facing upward. He held the welding torch in his left hand and used his right hand to balance himself.

During this process of torching the banding material off, some hot substance entered Mr. Reed's right ear, causing permanent hearing loss. Mr. Reed claims the hot substance was slag from the banding material or a spark and that it entered his ear when "the fire of the cutting torch hit the banding material." The point where he was cutting was "over three feet away" from his ear.

Mr. Reed testified in this deposition that prior to the incident at issue he had gotten hot sparks or slag in his ear while welding and that wearing ear plugs had prevented such hot material from going "down in the canal" as it had on this occasion. He also admitted that he knew "the possibility is always there" that a spark or other hot material could make its way into one's ear when using a cutting torch.

II. ELEMENTS OF THE CLAIM

FELA was passed to extend special statutory protection to railroad workers because of the high rate of injury to workers in that industry. *Hardyman v. Norfolk & Western Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001); *Levy v. Southern Pacific Transportation Company*, 799 F.2d 1281, 1288 (9th Cir. 1986). The statute is a broad, remedial statute which is to be liberally construed in order to accomplish its purpose. *Urie v. Thompson*, 337 U.S. 163, 180, 69 S.Ct. 1018, 1030 (1949). However, the statute is not a workers' compensation statute, does not impose strict liability on the employer, and does not render the employer an insurer of the employee's safety. *Inman v. Baltimore & O.R.R.*, 361 U.S. 138, 140, 80 S.Ct. 242, 243 (1959). Instead, it premises employer liability upon employer negligence.

To recover under FELA, an employee must show: (1) that an injury occurred while the employee was working within the scope of his employment; (2) that the employment was in the furtherance of the railroad's interstate transportation business; (3) that the employer railroad was

[1] Mr. Reed described this material as big, two-inch bands that he believed had come off loads of lumber.

negligent; and (4) that the employer's negligence played some part in causing the injury. *Jennings v. Ill. Cent. R.R. Co.*, 993 S.W.2d 66, 69-70 (Tenn. Ct. App. 1998), *citing Smelser v. Norfolk S. Ry. Co*., 105 F.3d 299, 306 (6th Cir. 1997). There is no dispute herein that the first two elements have been met.

The issues in this case are whether CSX was negligent and, if so, whether that negligence played some part in causing Mr. Reed's injury. The plaintiff's burden to prove causation under FELA is minimal, because the statute provides for railroad employer liability for employee injuries "resulting in whole or in part from the negligence" of the railroad, its officers, agents, or employees. 45 U.S.C. § 51. Thus, issues of primary or substantial cause and comparative negligence do not arise in FELA cases.

If the employer's negligence played any part, however slight, in bringing about the injury, the employer is liable. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448 (1957). Summary judgment for the employer railroad is not appropriate even where a jury may attribute the injury to other causes, including the employee's own negligence, if the employer was negligent and that negligence played any part in the injury for which damages are sought.[2] *Id*. Thus, a lower or reduced standard of causation is applicable.

Before causation, or comparison of negligence, becomes an issue, however, it must be shown that the railroad employer was negligent. FELA does not define negligence, and the question is to be determined "by the common law principles as established and applied in federal courts," presenting a federal question not dependent on varying state laws. *Urie v. Thompson*, 337 U.S. at 174, 69 S.Ct. at 1026; *Smith v. Union Pac. R.R. Co.*, 236 F.3d 1168, 1172 (10th Cir. 2000).

When determining the employer's negligence under FELA, courts are to analyze the elements necessary to establish a common law negligence claim. *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990); *Davis v. Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir. 1976), *cert. denied*, 429 U.S. 1002 (1976). To prevail on a FELA claim, a plaintiff must "prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation." *Robert v. Consolidated Rail Corp*., 832 F.2d 3, 6 (1st Cir. 1987); *see also Williams v. Nat'l R.R. Passenger Corp*., 161 F.3d 1059, 1062 (7th Cir. 1998).

Under FELA, the employer railroad has a duty to provide a reasonably safe workplace. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352, 63 S.Ct. 1062. 1062 (1943); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996); *Adams v. CSX Transportation, Inc*., 899 F.2d at 539.

[2]Thus, FELA carries a standard for comparing fault that differs from that applicable in negligence actions in Tennessee, as established in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), and its progeny. Accordingly, to the extent the trial court relied on comparative fault principles in granting summary judgment to the employer railroad, Mr. Reed is correct in asserting that such reliance would be in error.

A plaintiff cannot recover under a negligence theory unless his or her injuries are foreseeable. *Gallick v. Baltimore & O.R.R.*, 372 U.S. 108, 83 S.Ct. 659 (1963)(holding that foreseeability of harm is an essential ingredient in FELA negligence). FELA "encompasses all reasonably foreseeable injuries which result from a railroad's failure to exercise due care with respect to its employees." *Buell v. Atchison Topeka and Santa Fe Railway Company*, 771 F.2d 1320, 1321-1322 (9th Cir. 1985).

> An employer's duty of care in a FELA action turns . . . on the reasonable foreseeability of harm. The employer's conduct is measured by the degree of care that persons of ordinary, reasonable prudence would use under similar circumstances and by what these same persons would anticipate as resulting from a particular condition.

Ackley v Chicago and N.W. Transp., 820 F.2d 263, 267 (8th Cir. 1987); *see also Mitchell v. Missouri-Kansas-Texas R.R.*, 786 S.W.2d 659, 661 (Tex. 1990) (holding that under FELA foreseeability is an element of the employer's duty of care.) The railroad employer need not have foreseen the specific harm or particular consequences that resulted from its negligence. *Gallick v. Baltimore & O.R.R.*, 372 U.S. at 117-120.

III. THE GRANT OF SUMMARY JUDGMENT HEREIN

When reviewing a trial court's summary judgment decision, this court must review the record de novo without a presumption of correctness. *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 284 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We must make that review and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000).

The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair*, 130 S.W.3d at 764. Thus, summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265 (Tenn. 2001); *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Goodloe v. State*, 36 S.W.3d 62, 65 (Tenn. 2001).

In our review, we must consider the evidence in the light most favorable to the non-moving party, and we must resolve all inferences in the non-moving party's favor. *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001).

A defendant moving for summary judgment must, in its filings supporting the motion, either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. *Blair v. West Town Mall*, 130 S.W.2d 761, 767 (Tenn. 2004); *Staples*, 105 S.W.3d at 88-89. Only if the moving party presents evidence sufficient to justify grant of the motion is the nonmoving party required to come forward with some significant probative evidence which makes it necessary to resolve a factual dispute at trial.

In this appeal Mr. Reed argues that CSX was negligent in several specific ways. First, he argues that CSX created an unsafe working environment by failing to keep the ground free of the banding material. "[S]omebody should have had those bands cleaned up." As part of that argument, he asserts that CSX should have anticipated that if no one removed the banding from the ground, Mr. Reed would drive over it as necessary to perform his job. He did not notify anyone of the presence of the material and was not aware how long it had been on the ground, since the accident occurred shortly after he started his shift.

Second, Mr. Reed asserts that CSX was negligent by failing to enforce safety standards that would have prevented his injury. In this regard, Mr. Reed argues that he had not been instructed to wear ear plugs at all times or whenever he was operating a cutting torch. He claims CSX was negligent in not requiring or training him to use ear plugs when he was operating a cutting torch. Mr. Reed concedes that the cutting torch was not defective and that he had been trained to use it properly.[3]

Having reviewed the record herein, we conclude that CSX effectively negated an essential element of Mr. Reed's claim, *i.e.*, that CSX was negligent. We find the undisputed evidence does not show that CSX breached any duty of care to Mr. Reed or that injury was foreseeable.

Accordingly, the trial court is affirmed and costs of appeal are taxed to appellant, Paul L. Reed.

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PATRICIA J. COTTRELL, JUDGE

[3]The complaint also alleged that CSX failed to furnish Mr. Reed reasonably safe work equipment and failed to furnish him with necessary safety attachments for work equipment. Although Mr. Reed has not specifically abandoned those claims, and repeats them generally in his brief, there is absolutely no proof or even specific argument regarding them. Consequently, we consider them waived.